United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1328

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P/S

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM CAHN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

The defendant William Cahn appeals from a judgment entered in the District Court for the Eastern District of New York, Judd, *J.*, which convicted him of making false statements within the jurisdiction of the Law Enforcement Assistance Administration (Counts One to Three), of failing to disclose material facts within the jurisdiction of that agency (Counts Four to Ten) and of mail fraud (Counts Eleven to Forty-Four and Count Forty-Six).[1] The defendant was sentenced to imprisonment for a period of one year and one day to run concurrently on Counts One to Forty-Four. The imposition of sentence on Count Forty-Six was suspended and the defendant was placed on unsupervised probation for

[1] Count Forty-Five was dismissed before trial on the motion of the United States (A. 37).

a period of two years. A concurrent fine of $2500.00 was imposed on all counts (A. 1979).

Statement of Facts

A. Introduction

The statement of "Facts Developed at Trial No. 2", which is set forth in the appellant's brief, is taken almost entirely from his testimony at the trial. The defendant's exclusive reliance upon his own direct testimony, which the jury rejected, is understandable, since the evidence adduced on the direct case, on cross-examination of the defendant, and on rebuttal, paints a picture of fraud, deceit and attempted subornation of perjury.

The basic outline of the case-in-chief showed that over a period of five years the defendant, who frequented the casinos of Reno and Las Vegas and who cashed large checks there (A. 1257) and gambled for high stakes (A. 1552-1553), attempted to generate cash for his own use by seeking reimbursement, from Nassau County and from a number of law enforcement organizations in which he was active, for the same travel expenses. In so doing he would either certify falsely to the particular organization, or cause a member of his staff to falsely certify, that he was not receiving or could not receive compensation from any other source (Counts One to Three) or fail to disclose this fact, although each of the organizations from which he sought reimbursement had either written or unwritten rules which would not have permitted them to reimburse him if they had known that he was being reimbursed, or could have been reimbursed, by Nassau County for the same expense (Counts Eleven to Forty-Four and Count Forty-Six). Moreover, other evidence introduced on the issue of intent established that the de-

fendant often billed Nassau County and other organizations for hotel and other expenses which were provided to him free of charge. Indeed, in a blatent effort to suborn perjury, he approached a travel agent some three years after he billed Nassau County for $1,385.00 for a trip which actually cost him $395.00, and asked him to go along with a phony story which would help extricate the defendant from the investigation of his activities which had already commenced.

The "defense" offered by the defendant which is detailed in full at pp. 11-21, and was no defense at all even if it was accepted at face value, was, to say the least, barely credible. Briefly, the defendant described a meeting with a person to whom he attached the pseudonym "Sam Houston." This person allegedly offered to become a paid informer but only on the condition that extraordinary precautions be taken to secure his identity. Although it was possible for the defendant to obtain money to pay an informer without divulging his identity by simply using a code number to identify him, Mr. Houston allegedly objected even to this procedure for payment. Moreover, Mr. Houston also apparently insisted on meeting the defendant in various parts of the country to impart his information.

Despite the fact that information allegedly imparted at this initial meeting was a rehash of information which had already appeared in Newsday, clippings of which were collected by the Nassau County District Attorney's Office, the defendant agreed to Mr. Houston's conditions. To generate the money to pay Mr. Houston, or so the defendant claimed, he decided to arrange his extensive travel on behalf of various organizations in which he was active, to coincide with travel on business for Nassau County. The trip would be paid for by Nassau County and he would also file a claim for reimbursement from

the particular organization on behalf of which he had travelled.[2] The latter funds would be used to pay Mr. Houston in cash. The Comptroller of Nassau County could recall no conversation in which the specifics of this plan was discussed with him, and concededly, none of the organization was advised of the "beneficent" use the defendant was allegedly making of the monies which would not have been paid had they known the true facts.

Some $19,500.00 was allegedly paid to Mr. Houston over a period of five years. These payments were made even though the information given was described by the Chief of Mr. Cahn's Rackets Bureau as not worth "two-cents" and although it was shown that the information the defendant claimed was provided had previously appeared in Newsday or was otherwise already known in law enforcement circles. Moreover, the defendant, in fact, admitted that he used a code number to identify Mr. Houston (R.B. 15 S.P.) in claims he made to Nassau County for reimbursement on trips during which he met Mr. Houston, and that he could have used this method of obtaining funds without in the slightest way risking disclosure of Mr. Houston. Indeed, curiously, despite Mr. Houston's alleged concern for anonymity, he apparently agreed to meet the defendant in the presence of two other members of Mr. Cahn's staff, who were his close friends and travelling companions. The latter claimed to have witnessed payments to a person identified by the defendant as Sam Houston, in assorted

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[2] The payments from Nassau County were made as follows: Mr. Cahn would, prior to his trip, draw the money for his expenses out of a "Prosecution Fund" maintained by Nassau County (A. 44-45). After the trip, he would file the supporting documents justifying the expenses and Nassau County would then transfer funds to cover the advance from the "Prosecution Fund" (A. 44-45).

places throughout the country, although the originals of contemporaneous affidavits allegedly attesting to this fact were lost by the defendant, along with the original summaries of the information supplied by Mr. Houston, under unusual circumstances after the investigation of Mr. Cahn's activities began. Needless to say, according to Mr. Cahn, Mr. Houston likewise disappeared.

In short, it is doubtful whether a bona-fide informant by the name of Sam Houston ever existed. Indeed, there was evidence that the defendant engaged in double billing even before Mr. Houston was alleged to have appeared. But, even if there was such a bona-fide informant, his existence hardly justified the submission of claims which were patently false or which failed to disclose information that would have caused the payments to the defendant to have been withheld.

B. The Indictment

The indictment upon which the defendant was tried was a superseding indictment returned after a mistrial was declared when the jury was unable to reach a verdict on the original indictment. The original indictment, excluding two counts of perjury arising out of Mr. Cahn's testimony before the grand jury, which were severed, contained eight counts arising out of the double billing scheme described above: seven counts of mail fraud and one count charging the filing of a false statement within the jurisdiction of the Law Enforcement Assistance Administration (A. 11a-21a). The eight claims for dual reimbursement were singled out because the defendant had originally led us to believe that the proceeds were not used to pay the so-called informant named Sam Houston. Under these circumstances, it was assumed that the trial would not involve the issue of the existence

of Mr. Houston and a defense based on the alleged beneficent purpose which Mr. Cahn claimed he had used the proceeds of the numerous other transactions involving double billings.

Mr. Cahn, however, took the position—at the first trial—that he had been mistaken and that in fact he had used the proceeds of the claims charged in the first indictment to pay Sam Houston. When it became apparent that there would be a second trial, after the hung jury, at which the Sam Houston defense would be raised again, it was decided to seek an indictment which included all of the instances of double billings. Judge Judd was expressly advised of the reason for this decision prior to the second trial (A. 186a-187a).

Moreover, although Judge Dooling, who presided over the first trial, dismissed the single false statements count in the original indictment, further research disclosed that the defect Judge Dooling found could be cured by alleging not simply that the organization to which the statements were made was funded by the Law Enforcement Assistance Administration, but by alleging that the claim was paid with federal monies and by proving that the defendant knew that it would be paid in this way.[3] (*United States* v. *Candella*, 487 F.2d 1223 (C.A. 2, 1973), *cer-*

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[3] Judge Dooling observed in pertinent part (S.A. 13):

"Whether Count 7 can be saved as a Count directly under Section 1001 was not really argued. The Government's brief simply assumed that it was enough that the National Center for Prosecution Management was an LEAA funded organization. But an entity hardly becomes an agency or department of the United States because it is funded under such an LEAA program, and, in the light of only authority so far seen, it must be concluded that the Count is not sufficient under Section 1001 standing alone."

tiorari denied, 415 U.S. 977 (1974). Since this defect could be cured, and since it is a violation of Section 1001 to submit a claim which fails to disclose material facts, it was decided to charge violations of Section 1001, instead of mail fraud, where such claims were submitted within the jurisdiction of the Law Enforcement Assistance Administration.[4]

Accordingly, the superseding indictment, excluding Count Forty-Five, which was dismissed on our motion prior to trial (A. 37a), involved forty-four separate instances of double billing, including one (Count Forty-Six) which involved billing for a hotel room which had been provided free of charge and a double billing for transportation on the same trip. These counts may be divided as follows:

1. Counts One to Three

(a) Counts One and Two involved the filing of false statements within the jurisdiction of the Law Enforcement Assistance Administration, an agency of the United States, which provided the funds to the National College of District Attorneys (A. 452), which, in turn, used these monies, with Mr. Cahn's knowledge, to pay the claims which were submitted by him (A. 453-457). The claim involved in Count One was for $142.73 for air fare for a trip to Chicago, Illinois. Since Mr. Cahn was also conducting business for Nassau County on this occasion (A. 801-802) Nassau County paid his expenses for this trip. Nevertheless, he signed a certification in his claim filed with the National College of District Attorneys "that other funds are not available and I am not receiving reimbursement from any other source" (Ex. 1A, S.A. 2).

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[4] One mail fraud count, Count Forty, did involve the same claims which are the subject of the false statements in Counts One and Two.

The claim involved in Count Two arose out of the same trip. It was signed by Joseph E. Spinnato, the Chief of Mr. Cahn's Rackets Bureau. Mr. Cahn obtained the money to pay Mr. Spinnato's airfare from Nassau County. Nevertheless, without advising Mr. Spinnato of this fact (A. 222), he had him execute a claim containing a certification identical to that signed by Mr. Cahn in Count One (A. 223), stating "that other funds are not available and I am not receiving reimbursement from any other source" (Ex. 2A, S.A. 23). When the check arrived from the National College of District Attorneys, Mr. Spinnato endorsed the check over to Mr. Cahn (A. 220), who cashed it.[5]

(b) Count Three involved the filing of a similar false certification by the defendant with the National Center For Prosecution Management, on the Board of Directors of which he sat (A. 133), and which is wholly funded by the Law Enforcement Assistance Administration funds (A. 132). Although he received $246.80 for travel to a Board of Directors meeting in Mexico from Nassau County (Ex. 3, A. 2005-2006), he nevertheless certified that he was not receiving "dual compensation" (Ex. 3A, S.A. 26).[6]

2. Counts Four to Ten

Counts Four to Ten involved six claims for reimbursement to four different law enforcement agencies which

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[5] The claims involved in Counts One and Two provided the basis of Count Nine of the original indictment (A. 23a) which charged that they were sent in the mails as part of a scheme and artifice to defraud.

[6] The claim involved in Count Three had provided the basis for Count Seven of the original indictment (A. 21a) which likewise charged a violation of Section 1001 and which was dismissed before trial because of the defect discussed earlier on page 6.

were funded by the Law Enforcement Assistance Administration and which paid the claims with federal monies. Indeed, two of the claims, those involved in Counts Eight and Nine, were paid with United States Treasury checks (S.A. 59-60, 62-63). Although Nassau County again paid for each of these trips, the defendant failed to disclose this fact when he submitted his claim. None of these claims would have been paid if the truth had been known, and, indeed, the National District Attorneys Association, of which Mr. Cahn was President (A. 76), and which received the claim that is the subject of Count Four, had an explicit by-law banning such dual reimbursement (A. 135-137).

3. Counts Eleven to Forty-Four and Count Forty-Six

The claims involved in these counts were made to four separate law enforcement organizations under similar circumstances. The defendant, and on a number of occasions Mr. Spinnato, travelled on behalf of the County and a particular group, such as the National District Attorneys Association. He billed the latter for expenses for himself, and on several occasions for Mr. Spinnato, that were being paid by Nassau County without disclosing this material fact. Indeed, Count Forty-Six included the failure to disclose the fact that a hotel room for which he submitted a claim was complimentary. These claims were not paid with Law Enforcement Assistance Administration funds and the basis of federal jurisdiction was the use of the mail. Moreover, here again, each of the organizations had written or unwritten rules which would have precluded payment had they known the truth. Indeed, eighteen of the thirty-five counts in this category were made to the National District Attorneys Association which, as has been noted, had an

express written by-law barring such dual reimbursement (A. 135-137).[7]

C. The Evidence At Trial

The case-in-chief has largely been outlined above. In each of the counts of the indictment, as the defendant himself conceded in the district court, "the two billings here are obviously not in dispute", but "the entire matter depends on the state of mind of the defendant" (A. 977). The defendant having outlined the issue in this way, we proceed to detail the evidence which the defendant claimed below and asserts here somehow vindicates him.

The story begins in January of 1970 when Mr. Cahn said he received a call in his office from "an individual who wanted to meet me" (A. 750). Mr. Cahn was unable to relate the exact conversation "but the conversation was such as to whet my appetite." (A. 750-751). The District Attorney of Nassau County, therefore, agreed on the basis of this conversation to meet the caller at Roosevelt Field Shopping Center. The individual came up to Mr. Cahn and allegedly identified himself as the caller (A. 751). According to Mr. Cahn, the individual stated (A. 751):

> "He told me he is coming to me because he heard I was trustworthy, that I was a fair guy, and he told me when I was president of the State District Attorneys' Association he knew I put through a resolution that law enforcement or the district attorneys would no longer use the word Mafia, rather organized crime, and because of all that he is coming to me.

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[7] The claims involved in Counts Thirty-Seven, Thirty-Eight, Forty and Forty-Three had provided the basis for Courts Four, Five, Nine and Six, respectively, of the original indictment (A. 20a-21a).

> He told me he had a relative who was an informant for some law enforcement agency. He didn't tell me the relative and wouldn't tell me the law enforcement agency, but he said as a result of a leak his relative was killed. He was mad. He thought there was negligence. He thought it might have been deliberate.
>
> He was coming to me to cooperate with me and he would give me information. He wasn't that much interested in money. He was more interested in the revenge."

Mr. Cahn advised this person that he was not going to buy "a pig in a poke" and he asked for information which would "indicate some reliability on his part." According to a summary of the meeting, which was allegedly prepared shortly thereafter (A. 2070), the information provided at this meeting was as follows (A. 2070):

> "He informed me that there was a big move on by the Mob to take over the restaurants and other businesses in Long Island. He also told me that Paul Vario was a prime mover in the Golden Dome [Restaurant]. He also informed me that there is trouble brewing between the Mobs. He wasn't more specific but stated that people were going to get killed."

This information has previously appeared in articles in Newsday prior to the meeting, and the articles had been clipped and filed by the Nassau County District Attorney's Office (A. 1192). So, for example, in an article which appeared on December 23, 1969, Newsday told of an effort to obtain records from the Nassau County District Attorney's Office for use in license revocation proceedings regarding the Golden Dome Restaurant. The article stated (Ex. 68, S.A. 242):

> "A lawyer for the Fugit Restaurant Corp., which runs the Golden Dome Restaurant, 1 Bridge Plaza, Atlantic Beach, had contended that the records were needed for its defense in a license revocation hearing now pending before the authority. The authority has charged that the corporation's president, Sidney Fordan, 47, of 1398 Park St., Atlantic Beach, allowed Cosa Nostra figure Paul Vario to hold a secret interest in the restaurant, with allowed after-hours liquor sales and allowed narcotics sales."

Similarly, on September 27, 1969, Newsday reported on events which "Costa-Nostra-watchers think may be the beginning of a new round of violence within mob ranks" and on a related investigation being conducted by the Nassau County District Attorney's Office (Ex. 70, S.A. 244).

Although Mr. Cahn was forced to concede that this information did not come as a surprise to him either (A. 1232), he had a "hunch" that this individual "might prove to be a reliable source of information" (A. 755). Accordingly, he immediately began to consider how to accede to the request of the source of this information for future payments. According to Mr. Cahn, the individual, who was given the pseudonym Sam Houston, "stipulated certain conditions" (A. 752-753):

> "* * * One, that I would never try to determine his true identity; that he would absolutely sign no receipt for any money given to him, and that he would tolerate—he didn't use the word tolerate, I am paraphrasing now—he did not want me to submit any vouchers or claims or anything else—and he was quite knowledgeable in that particular area—to anybody which would in any way suggest a payment.
>
> * * * * *

> Another one of the conditions was he would no longer meet me in the metropolitan area. * * * However he told me because of his position he had been in a position to meet me anywhere that I said almost at any given time. This was quite unusual. I had never heard of it before. And I said that he would have to let me know—where can I get in touch with you, that question."

The next day Mr. Cahn claimed to have had a meeting with the then Comptroller of Nassau County, Angelo Roncallo, to clear with him the method he proposed to use to pay Mr. Houston without submitting vouchers (A. 756-757):

> "Q. What conversation did you have with him?
>
> A. Well, I did hypothesize—I didn't say I've got an informant—I did give him what is commonly termed a for-instance, suppose.
>
> He told me that he knew of no way of paying an informant without submitting a county voucher. Then I suggested to him that if I travelled on behalf of the County and travelled on behalf of the National District Attorney's Association and received my expenses from the National District Attorney's Association and used the money to pay the informant without submitting a voucher, would he have or would he know of any legal prohibition or any kind of prohibition at all."

According to Mr. Cahn, Mr. Roncallo responded by saying (A. 759):

> " 'Look, what you got from anyplace else is your money, and I don't care what you do with it so long as you don't also claim money from the county. So you can do with it as you wish.' But, he said, 'If I were you I would keep a record of what you paid this informant, if you paid him.' "

Mr. Roncallo had a different recollection. Indeed, Mr. Roncallo testified that, in late 1975, the defendant came to see him with an affidavit that he wanted Mr. Roncallo to sign (A. 615-617). The affidavit, in substance, stated that in January of 1970, Mr. Cahn came to him with a proposal about billing Nassau County and outside entities for the travel expenses and using monies or half the monies to pay an informant and that Mr. Roncallo approved this after it was outlined to him (A. 617). Mr. Roncallo testified that the affidavit did not accord with the facts as he remembered them. The plan "didn't have my approval," said Mr. Roncallo, "We never discussed direct plans" (A. 617-618):

> "Q. And did Mr. Cahn tell you, 'Look, I'm in a jam, Angie, would you help me out,' or something like that, something to that effect?
>
> A. I don't think he expected me to lie for him.
>
> I would have to say in truth that perhaps he remembered the conversation one way and I remembered it another way. I didn't sign the affidavit though, because I don't recall that the facts that were therein were as they were described.
>
> Q. It didn't accord with events as you remembered them. Is that right?
>
> A. That's right."

Mr. Roncallo, who was a "good friend" of Mr. Cahn (A. 604), could only recall a conversation at which Mr. Cahn expressed some concern about preserving the confidentiality of informers, but was not sure that any mention was made about getting funds from another source and "no specific method was discussed" (A. 607).

The reason that a conversation of the kind Mr. Cahn described probably never took place was because the

scheme was unnecessary to protect the informant, as Mr. Roncallo, and his successor as Comptroller, Mr. Christ, testified and as Mr. Cahn ultimately admitted.

Mr. Roncallo himself testified that it was plainly possible to submit vouchers to obtain monies to pay informants without identifying them by name or the place they were paid (A. 612, 621). Mr. Christ, who succeeded Mr. Roncallo, testified similarly (A. 91-92) and to his acquiescence in other procedures to protect the confidentiality of informants (A. 63). Most significant of all was Mr. Cahn's own testimony. His initial explanation for not using the voucher system was that he would at least have to use a code number to identify the informant, and this "didn't satisfy" Mr. Houston (A. 754). But Mr. Cahn himself identified Mr. Houston by a code number, "R.B. 15 S.P.", in vouchers which he filed with the comptroller to justify payments by Nassau County for trips he made, allegedly to meet with Mr. Houston (1298). After admitting to this, Mr. Cahn was asked whether someone in the Comptroller's Office would be able to tell "that R.B. 15 S.P., that being Sam's code, had been the subject matter of your trips to different cities on different dates and possibly they could piece it together" (A. 1299).

Mr. Cahn responded that this could not have happened because there was no file kept on R.B. 15 S.P. Well, then, Mr. Cahn was asked, could he not have used the same system for obtaining money to pay Mr. Houston (A. 1299):

> "Q. Couldn't you have simply put on a regular County claim, like relating to other informants, for payment to informant, Re: R.B. 15 S.P., $1,000, and submitted it to the County Comptroller, right?

A. I could have done that.

Q. And you wouldn't have any file in your office, right?

A. I could have done that.

Q. No one would have known what the R.B. 15 S.P. meant? Right?

A. That is correct.

Q. You wouldn't have had to put down the date you paid Sam Houston in the claim, isn't that right?

A. That's correct.

Q. And you wouldn't have had to put down the place at which you met Sam Houston; isn't that correct?

A. That's correct, nobody would have known whether I paid Sam Houston or not or anybody else or not. I could have done all those things."

Moreover aside from this testimony which showed that it was not necessary to use monies from various law enforcement organizations to pay Mr. Houston without risking disclosure of his identity, Mr. Cahn's own evasive testimony corroborated other evidence showing that he knew the organizations from which he was obtaining these funds would not have paid if they had known the truth. The following questions and answers were particularly instructive (A. 1157):

"Q. Did you think that, if you told Bob Fertitta in any of these cases Nassau County was paying for the same airline ticket the National College was paying for, Bob Fertitta would have said, 'Okay, Bill, we'll pay you, too?'

A. If I had told him that, I would think he would say, 'Under what circumstances?'

Q. Do you think if you told him, 'while the County is paying my air fare, everything, your check I'm going to cash and pay to the Nassau County informant'? Do you think Bob Fertitta would have said, 'That's okay, Bill'?

A. I wouldn't have told him that. That's not exactly what happened."

Of course that is exactly what happened.

There is, however, much more than this testimony by the defendant himself which undermines the so-called "defense" based on his allegedly innocent state of mind and the existence of a bona-fide informant by the name of Sam Houston.

Although some $19,500 of funds obtained from various law enforcement organizations were paid to Mr. Houston, the information allegedly purchased was shown to be worthless gossip which had either previously appeared in Newsday or were well known in law enforcement circles (A. 1602-1620), as Mr. Cahn himself was forced repeatedly and reluctantly to acknowledge (A. 1192-1193, 1227-1250, 1320-1325). No cases were ever opened as a result of the information provided (A. 1327), nor were any investigations commenced by the Nassau County Police Department (A. 687). Moreover, the Chief of the Rackets Bureau said the information was not worth "two cents" (A. 707).

All of this evidence tended clearly to support the compelling inference that the Sam Houston story was an ex post facto defense conceived to enable Mr. Cahn to place in a less damaging light his deceitful and

fraudulent conduct. The exhibit allegedly containing summaries of the information imparted by Mr. Houston (A. 2070-2080), could have easily been prepared, after the investigation began, from Newsday clippings in Cahn's files and other information generally known in law enforcement circles. So could the affidavits which were signed by Mr. Cahn's closest aides and travelling companions and which were witnessed by his devoted secretary, who is "a very good friend" (A. 351).[8] Indeed, these affidavits point out another inconsistency in Mr. Cahn's story which may be explained by the necessity of providing witnesses for an incredible tale. Supposedly, the whole double billing scheme evolved because Sam Houston was so concerned about the confidentiality of his identity that he was opposed to having the defendant submit vouchers for payments to him which only identified him by a code number. Indeed, Mr. Houston was said to have insisted that Mr. Cahn "meet him alone" (A. 750). Yet, he apparently did not object to meeting Mr. Cahn in the presence of one or often two of Mr. Cahn's associates.

This brings us to the final curious episode in the story of Sam Houston—the loss of original affidavits attesting to these meetings and other original document containing the summaries of Mr. Cahn's meetings with Mr. Houston. These documents were allegedly prepared shortly after each meeting. But, after the investigation, they disappeared in the most extraordinary way.

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[8] Of Course, even if the affidavits were truthful, there is nothing other than Mr. Cahn's word to prove that the individual they observed with Mr. Cahn was a bona-fide informer named Sam Houston. The information was worthless, and Mr. Spinnato, the Chief of the Rackets Bureau, who was one of the witnesses, admitted that he was not certain "Mr. Houston" was a bona-fide informer (A. 707-708).

Although the defendant had xerox copies of these documents, he decided to take the originals to Washington, D.C. to consult with an attorney about them. This was after they had been requested by the United States Attorney (A. 771). After conferring with his attorney, who made copies, he stayed overnight in Washington and was going to catch a plane to New York in the morning. When he arrived at the airport, he went to the men's room. He was carrying the attache case containing the originals of these vital documents and an overnight case (A. 771). Mr. Cahn then explained on cross-examination (A. 1337-1338):

> "I was standing in front of the urinal. On the left-hand side closest to the water closets was my attache case, which was placed on the floor. My black suitcase, an overnight suitcase, was next to the wall on my right-hand side. After doing what I had to do, I bent down, the suitcase was there, the attache case was gone."

This incident was not witnessed by anybody, nor were the original documents, which could have been subjected to various tests to determine when they were prepared, recovered.

So much for the defense which can hardly sustain its own conflicts, contradictions and incredulities. There is, however, more.

D. The Similar Acts

Billing entities for expenses which he did not incur or which were paid by others was nothing new to Mr. Cahn. In 1969, before he met up with Sam Houston, he had billed the National District Attorneys Association for expenses paid by Nassau County (A. 1184-1187).

But there are other simlar instances of misconduct involving Mr. Cahn's far flung travels.

1. In 1971, Mr. Cahn travelled to London to attend a National District Attorneys Association Conference, of which he was President. No Nassau County business was transacted, but he was able to obtain authorization to have Nassau County pay for the trip. The actual cost to Mr. Cahn for the trip was $395.00; apparently as a courtesy the remaining balance was written off by A.T.S. Travel Ltd. which was handling all the arrangements (A. 396-397). Mr. Cahn nonetheless obtained an invoice on the stationery of a subsidiary of A.T.S. Travel Ltd. for $1,050, which he filed with his Nassau County reimbursement claim for $1,358.00 (Ex. 63, S.A. 231-232).[9]

Sometime in December, 1974, three years later, when the investigation was under way, he visited A.T.A. Travel Ltd. and conferred with its officers. He spoke to them about his personal problems and "the impending investigation that this trial is all about" (A. 507). According to one of the officers, Ira Theodore, Mr. Cahn "was quite concerned about the London trip, and he asked us to back him up concerning payment of that trip of that open balance. We couldn't do that." (A. 507). Nevertheless, Mr. Cahn "proceeded to give us a check in the amount of $1,050 that we never cashed, which was to be payment for that trip, of that open balance. He said that in cleaning out his office, he discovered the unpaid invoice for $1,050 and he wanted to settle it at this time." (A. 507).[10] A copy of the check which was never cashed because of concern of A.T.S. regarding the propriety of Mr. Cahn's

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[9] The additional $335.00 was said to be for meals and gratuities which were not covered by the invoice (S.A. 231).

[10] The conversation was also confirmed by another officer of A.T.S. (A. 1498-1499).

request (A. 509), was admitted into evidence at trial (S.A. 254). Interestingly, Mr. Theodore in an effort to avoid embarrassing Mr. Cahn (A. 512-513), did not produce the check or relate the circumstances under which it was given to him until after Mr. Cahn had attempted, on cross-examination of Mr. Theodore (A. 411), to suggest he had paid the full amount due A.T.S. Travel in cash. After he was excused as a witness, Mr. Theodore decided to tell the whole story and was then recalled to the stand.

2. In March, 1971, prior to his London trip later that year Mr. Cahn travelled to Honolulu, Hawaii to attend a conference of the National District Attorneys Association and billed Nassau County for the trip (Ex. 64, S.A. 236-237). Included in the claim were the cost of accommodations at the Surfrider Hotel in Honolulu, Hawaii, which was listed at $436.80, and an invoice indicating that this expense had been incurred for Room 1484 was included among the supporting documents (S.A. 250).

The records of the Surfrider Hotel, however, showed that Mr. Cahn stayed in Room 1496, not Room 1484, and that the room had been provided free of charge (A. 422). The photocopy of the invoice Mr. Cahn submitted to Nassau County was for a room which had been occupied by one Nicholas Popademus, who had paid it (A. 1549-1550). Moreover, it was apparent that in making the xerox copy of the invoice which Mr. Cahn submitted to Nassau County (Ex. 64, S.A. 239), Mr. Popademus' name and other identifying information (in the upper left hand corner) had been covered over.[11]

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[11] This was shown by a carbon copy of the original which had Mr. Popademus' name and other identifying material (Ex. 82A, S.A. 239).

3. Nassau County was victimized once again in a similar way in 1972, when Mr. Cahn submitted a claim for a complimentary hotel room for himself and various members of his staff that was allegedly incurred at the American Hotel in San Juan (A. 439, Ex. 17C).

This then is the picture which emerges after a review of all of the evidence—evidence which was studiously ignored in the statement of "Facts Developed at Trial No. 2" contained in appellant's brief. As we observed in the introduction, it is a picture of fraud, deceit, and attempted subornation of perjury. We now turn to the legal arguments based on the expurgated version of the record which Mr. Cahn's brief contains.

ARGUMENT

POINT I

THE SUPERSEDING INDICTMENT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS AND DID NOT PLACE HIM IN DOUBLE JEOPARDY.

The superseding indictment upon which the defendant was tried contained forty-five counts based upon forty-four separate instances of double billing. The reason for the superseding indictment, and the increased number of counts was discussed earlier at pp. 6-7, and Judge Judd was expressly advised of the reason after the superseding indictment had been returned. As the Assistant United States Attorney explained (A. 180a-187a):

> The defendant testified in the Grand Jury that in 46 of these instances he paid these monies to an informant by the name of Sam Houston, whose identity he did not know and whom he's not been able to locate. Rather than litigate this Sam

> Houston issue, and whether or not he exists, the Government chose to take those seven counts or instances in which the defendant had not accounted for the monies generated by the double billing, and we put those in the first indictment. The defendant then claimed at trial and he said, "Oh, I made a mistake in my accounting. Some of the others didn't go to Sam Houston. The seven that the Government charges did go to Sam Houston."
>
> And we wound up splitting four of the—litigating the Sam Houston issue. And the Government decided, since the Sam Houston thing came out, we might as well have the 55 or however many are in the Statute of Limitations and let the chips fall where they may. And that's the reason for the additional counts in the second indictment.

It is settled law that "the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *United States* v. *Shotwell Mfg. Company*, 355 U.S. 233, 243 (1957)), and by the addition of other counts. *United States* v. *Ewell*, 383 U.S. 116, 124-25 (1966); *Howard* v. *United States*, 372 F.2d 294 (C.A. 9, 1967), *certiorari denied*, 388 U.S. 915; *United States* v. *Jasso*, 442 F.2d 1054 (C.A. 5, 1971); *United States* v. *Poll*, 538 F.2d 845 (C.A. 9, 1976). The defendant argues, however, that the superseding indictment should have been dismissed because "the prosecution after a trial, may not 'up the ante' by superseding the original indictment so as to include additional charges against the defendant, especially when the facts constituting the later charges are known to it at the time of the original indictment" (Br. 18). This claim is without substance for a number of reasons.

1. We do not believe that the cases cited by the defendant support the proposition which he deduces from them. They stand at most for the proposition that where the defendant is successful in setting aside a conviction, or has successfully asserted a right for which he should not be punished, the charges against him may not be increased or multiplied without some justification. But here the defendant did not successfully assert any right. Instead, a mistrial was declared with the consent of both sides, because the jury was unable to reach a verdict. In this respect, the only mistrial case the defendant cites, *United States* v. *Jamison*, 505 F.2d 407 (C.A.D.C. 1974) is plainly distinguishable from the present case.

There the defendants moved for a mistrial because of the ineffective assistance of counsel and the motion was granted (505 F.2d 409). In holding that, after exercising this right, the defendant could not, without justification, be subjected to retrial on an increased charge, the Court of Appeals observed (505 F.2d at 416):

> The question for us, therefore, is whether to differentiate between attacks which defendants make on the fairness of criminal proceedings before and after they are complete. We decline to draw such a distinction, primarily because of its "implications . . . for the sound administration of justice." * * * Imposing a ceiling on subsequent indictments after reversals but not after mistrials would discourage defendants from seeking mistrials when error prejudicial to them has occurred, whereas mistrials in such cases may represent a significant saving of judicial resources. At the same time it would encourage prosecutorial efforts to "overreach" and induce mistrials on defendant's motion in exactly the way that the Supreme Court deplored. * * *

This reasoning is not applicable where a mistrial results not because a defendant sought it as a result of prejudicial error or because it was provoked by the prosecutor. The mistrial was declared, with the consent of both sides, because the jury was hopelessly deadlocked and pleaded to be discharged. The superseding indictment did not penalize the defendant for asserting any right. Indeed, all it was intended to do was enable the United States to avoid any confusion which may have resulted from what must have otherwise have appeared to the jury to be an arbitrary isolation of a handful of claims. There was ample justification for the additional counts.

2. Assuming the defendant is correct in his analysis of the case law, he still would not be entitled to the dismissal of the entire indictment. Certainly he still could have been subjected to trial on at least the same number of counts that were included in the original indictment, whether or not they arose out of the same claims, since this would not in any way be subjecting him to the possibility of increased punishment as a result of the assertion of any right. Here seven of the forty-five counts in the superseding indictment were the subject of seven of the nine counts in the original indictment (See, *supra*, pp. 7-10 and footnotes 5, 6 & 7). Quite clearly, those counts and at least two others would be permitted to stand without implicating the principle of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) and *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Indeed, since in actuality the defendant received concurrent sentences on all but one count, and since the total sentence was not greater than that which could have been imposed on the first indictment, it is doubtful that the principle of those cases is even applicable at all. As the Court of Appeals for the Ninth Circuit observed recently in rejecting a claim similar to that raised here *United States* v. *Poll*, 538 F.2d 845, 847 (9th Cir. 1976):

> Poll also argues that by approving the second trial we may be permitting the Government to circum-

> vent the prohibition in *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1956), against retaliatory sentencing. *Pearce* prohibits a trial court from increasing the sentence upon retrial without explaining the change in circumstances which warrants the increase. Poll, however, is not claiming that he has received a harsher sentence upon retrial, and therefore, has no ground for complaint.

Cf. Barnes v. *United States*, 412 U.S. 837, 848, n.16 (1973).

This holding is clearly in accord with the rationale underlying *Blackledge* v. *Perry* and *North Carolina* v. *Pearce*. A defendant who has not been punished more than he could have been had he been tried on the original indictment has not been punished for vindicating his rights.

The "prejudice" cited by appellant at page 19 of his brief is not the product of a violation of the principle underlying *Blackledge* v. *Perry*, and *North Carolina* v. *Pearce*, but is mainly the product of the well-settled rule that a mistrial places the defendant in the same position as if there had not been a trial. See e.g., *United States* v. *Sanford*, — U.S. —, 45 U.S. Law Week, 3278 (1976). Thus he argues:

> "It is clear that defendant has been prejudiced; increased expenses, inability to retain trial counsel, increased public scorn and embarrassment and exposure to increased penalties. Further the inclusion of Count 46 in the superseding indictment was the predicate for introducing evidence of other similar acts, which as will be developed in Point V, *infra*, was highly prejudicial to defendant. Further, Mr. Cahn actually received an increased

> penalty in that on Count 46 which was not charged in the original indictment he received two years of unsupervised probation (1976)."

Here the second trial was shorter than the first, and so was the case-in-chief.[12] This was largely because almost all evidence—on both sides—would be admitted and revealed to the public, regardless of the number of claims which are made the subject of individual counts. Nor was there any realistic exposure to increased penalties. Surely, the defendant did not expect to receive more than the forty-five years in prison that he faced on the original indictment. His claim that he, in fact, actually received "an increased penalty" on Count 46, which was not charged in the original indictment, because he received two years unsupervised probation, confuses the concurrent sentence doctrine with the principle of *Pearce* and *Blackledge*. While the two years unsupervised probation, on top of the one year and day period of incarceration imposed on other counts, may be sufficient to defeat the application of the concurrent sentence doctrine as to that count, it is not an "increase" over the maximum sentence that could have been imposed had he gone to trial and been convicted on the first indictment.

Moreover, the fact that the mail fraud alleged in Count 46 included a claim for a hotel room that was provided free of charge, and may have opened the door to prior similar acts, likewise has nothing to do with concern about "prosecutorial vindictiveness" that *Blackledge* and *Pearce* reflect. Indeed, if anything, it shows a rational basis unrelated to that evil. Surely those cases

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[12] The first trial, from opening statement to verdict, consumed some 2072 pages of transcript; the second trial consumed only 1902 pages.

would not have precluded us from substituting that mail fraud count in place of one already in the original indictment, since no increased additional punishment was possible.[13]

3. There is one final point. The argument based on "Blackledge and its progeny" was concededly not timely raised before trial, as required by F.R. Crim. P., Rule 12(b), but instead was raised for the first time in a post-trial motion (App. Br. 19-20). Indeed, in a memorandum before trial, the defendant stated that he "does not argue that he cannot be retried upon the superseding indictment, nor that the Government is limited to using the same evidence adduced at the first trial." (A. 136a). Instead, "[w]hat is disputed is the government's ability to intentionally hold back alleged violations from one indictment in order to obtain disclosure of the defendant's case and refine its own prosecution in light of the events at the first trial" (A. 136a). Of course, the principal fallacy of this argument is that, even if all the charges had been included the first time, there would still have been a mistrial (perhaps a conviction) and the defendant would have been in the same position or worse. More-

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[13] We do not accept the predicate of this argument, that Count 46 was essential to obtaining the admissibility of the prior similar acts discussed at pp. 19-22. Although Judge Dooling, who tried the first indictment, said that billing an entity for complimentary travel and hotel expenses was not similar to the acts charged in this indictment, we believe, for reasons set out in Point V, that he was wrong. In both instances the defendant billed one entity for a charge which he personally never incurred. Moreover, each of those prior acts involved a false certification on a voucher to Nassau County to obtain reimbursement, not unlike those involved in Counts One through Three. In any event assuming the defendant is correct, the proper remedy should have been a motion to sever Count Forty-Six, not a motion to dismiss the entire indictment.

over, there is no bar to refining a prosecution in light of the events at the first trial. See *United States* v. *Shotwell Mfg. Co.*, *supra*, 355 U.S. at 243; *United States* v. *Ewell*, *supra*, 383 U.S. 124-125.

In any event, the failure to raise, prior to trial, the argument so fervently pressed here, constitutes a waiver of the claim and it may not now be raised here, F.R. Crim. P., Rule 12(f); *Davis* v. *United States*, 411 U.S. 233 (1973).

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION ON COUNTS ONE TO TEN.

A. The Claims Were Made Within the Jurisdiction of an Agency of the United States

The defendant argues that the evidence on Counts One to Ten, which charge the submission of false statements within the jurisdiction of the Law Enforcement Assistance Administration (Counts One to Three) and concealing of material facts within its jurisdiction (Counts Four to Ten), was insufficient because the organizations to which the claims were made were not themselves agencies of the United States (Br. 27):

> "In other words, the non-governmental organization has a finite sum of money some of which was Federal money, and the claim of the defendant for reimbursement of his expenses was transmitted to the non-governmental entity which reimbursed him with that entity's funds, the entity never obtaining permission or consent of the Federal agency to make payment, and the agency never even seeing the claim."

This argument is neither supported by the law or the record, and the cases cited in support of it have either been distinguished or overruled. It is now settled law that where a claim is made to a non-federal agency administering federal monies and the claim is paid with federal monies, the claim is deemed to have been made within its jurisdiction, if the evidence establishes that the defendant was aware of these facts. *United States* v. *Candella*, 487 F.2d 1223, 1225-27 (C.A. 2, 1973), *certiorari denied*, 415 U.S. 977i (1974); *United States* v. *Lange*, 528 F.2d 1280, 1287 (C.A. 5, 1976); *United States* v. *Kraude*, 467 F.2d 37, 38 (C.A. 9, 1972), *certiorari denied*, 409 U.S. 1076 (1972). Indeed, the defendant's brief incredibly ignores these cases which were relied upon in the district court (A. 104a). Here the evidence plainly satisfied that test.

There are five law enforcement groups which are the subject of the claims in Counts One through Ten and it is conceded that each was funded either in whole or in part by the Law Enforcement Assistance Administration (Br. 23), which audits the books and records of its grantees (A. 254) and regulates the manner in which its grants are to be spent (A. 254-255). Moreover, it is likewise not disputed that the claims were paid with Law Enforcement Assistance Administration money. The evidence was also more than sufficient to establish that the defendant knew that he was filing a claim which would be paid with Law Enforcement Assistance Administration funds.[14] We here summarize that evidence.

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[14] In light of *United States* v. *Feola*, 420 U.S. 671 (1975), it is debatable whether such a showing of knowledge need now be made. See *United States* v. *Viruet*, 539 F.2d 295, 297 (C.A. 2, 1976).

1. The National College of District Attorneys was the recipient of the claims involved in Counts One and Two. The National College, of which Mr. Cahn was a member of the Board of Regents (A. 453), receives 75% of its funds from the Law Enforcement Assistance Administration. The fact that the Law Enforcement Assistance Administration funded the program at which Mr. Cahn lectured and for which he submitted claims for reimbursement, was discussed at a meeting of the Board of Regents at which Mr. Cahn was present (A. 453) and he was sent a copy of the minutes (A. 454, 457). Indeed, Mr. Cahn himself did not dispute the fact that he was aware that the project was paid for by the Law Enforcement Assistance Administration (A. 1167). Moreover, the policy of the National College would not have permitted payment of the claim had the truth been known (A. 459-460) because "we are a private, very small private institution and we have limited funds, and we attempt to conserve our funds" (460).[15]

2. The National Center for Prosecution Management was the recipient of claims which are the subject of Counts Three, Five and Six and is

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[15] Although Counts One and Two alleged that the claims were filed with the National College of District Attorneys, the last sentence of those counts inadvertently stated that the National District Attorneys Association, rather than the National College of District Attorneys, was funded by the Law Enforcement Assistance Administration and paid the claim with Law Enforcement Assistance Administration funds. Judge Judd ruled that this was not a material variance (A. 581) and the grand jury, which was still sitting, authorized a formal amendment of the indictment to correct the error (A. 45a-46a). The variance is not an issue on this appeal.

funded solely by the Law Enforcement Assistance Administration (A. 118). Mr. Cahn was a member of its Board of Directors (A. 117) and this fact was, of course, known by the Board of Directors (A. 133). Moreover, the claim form itself indicated that payment was governed by Law Enforcement Assistance Administration guidelines (Ex. 3a, S.A. 26). Those guidelines would not have permitted payment had the truth been known (A. 138, 260-261).

3. The National District Attorneys Association was the recipient of the claim which is the subject of Count Four. The project on which Mr. Cahn travelled, and for which he claimed reimbursement, was funded by the Law Enforcement Assistance Administration (A. 132). Mr. Cahn was then President-elect of the National District Attorneys Association and a member of its Board of Directors and the topic of Law Enforcement Assistance Administration funding was discussed at meetings at which he was present (A. 134). In accordance with Law Enforcement Assistance Administration guidelines and the by-laws of the National District Attorneys Association, the claim would not have been paid if the truth had been known (A. 136-138).

4. The National Police Task Force was a recipient of the claims which are the subject of Counts Seven, Eight and Nine. The Task Force, which was part of the National Advisory Commission on Criminal Justice Standards and Goals, was wholly funded by Law Enforcement Assistance Administration and administered by the Los Angeles County Police Department (A. 529). Mr. Cahn was present at discussions regarding Law

Enforcement Assistance Administration funding (A. 532), he wrote a letter indicating his awareness of it (A. 535), the claim forms indicated that "United States Government travel regulations" were applicable (S.A. 48, 51, 61), and two of the claims, Counts Eight and Nine, were paid with United States Treasury checks (A. 533, S.A. 59-60, 62-63). Needless to say at this point, it too would not have paid the claim if it had known the truth (A. 537).

The Arizona County Attorneys Association was the recipient of the claim which was the subject of Count Ten. The Association receives 95% of its funds from the Law Enforcement Assistance Administration (A. 360), and it was clearly indicated to Mr. Cahn that his expenses would be paid with Law Enforcement Assistance Administration funds (A. 361). The claim would not have been paid had the truth been known (A. 365).

So much for this frivolous claim.

B. The Evidence Was Sufficient to Prove a Knowing And Wilful Falsification

The defendant also alleges that there is a complete failure of proof with respect to the "elements of knowing and wilful falsification" (Br. 28). This claim is equally frivolous. It is based on the claim that Mr. Cahn intended that the particular organization "bear the cost of the trip" and that the money he received from Nassau County for this purpose was a loan to him which he repaid by the payments he made to Sam Houston (Br. 28).

Of course, what Mr. Cahn intended was for the jury to decide and there is more than ample evidence, which

has been set forth at length, to indicate that Mr. Cahn acted with the requisite *mens rea* and that there was no bona-fide informant named Sam Houston. Moreover, it should be emphasized that certification in Counts One and Two provided that "funds are *not available* and I am not receiving reimbursement from any other source." Quite plainly, even under the theory advanced in the brief, funds were available from Nassau County to pay the expense because County business was conducted on the particular trip (Tr. 801-802). This is also a sufficient answer to appellant's final claim that he paid the monies from the claims in Counts One through Three directly back to Nassau County.[16]

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION ON THE MAIL FRAUD COUNTS.

The defendant's arguments regarding the mail fraud counts are divded into two separate points. One seems to relate to the theory of the charge and the other to the sufficiency of the evidence. We deal with both of these points here.

A. The Theory of the Fraud

The defendant argues, in essence, that it is not "a criminal act to claim reimbursement of the same expenses

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[16] The direct repayment on Counts One and Two came after it was clear to the appellant that the investigation would not end with his defeat at election in November 1974 (A. 338). Moreover, the evidence that he made a direct repayment of the claim in Count Three was the testimony of his loyal and devoted secretary who said she cashed the National Center for Prosecution Management check and paid the proceeds to the County (A. 332). No documents were produced to substantiate this claim.

which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses" (Br. 33).

The answer to this argument is that this is not what the record reveals. None of the law enforcement organizations was "independently obligated" to reimburse him for claims which had been paid by Nassau County. We have already detailed the testimony of representatives of each of the organizations with which claims were filed that they had written or unwritten rules which would have barred payment of the claim (see, *supra*, pp. 31-33). Indeed, the National District Attorneys Association, of which Mr. Cahn was President, and which was the recipient of eighteen of the thirty-five claims which are the subject of the mail fraud counts, had an express written by-law precluding payment (A. 135-137). Accordingly, the insurance cases, involving adhesion contracts under which the carrier has obligated itself to make payment on the happening of a particular contingency, are wholly inapposite here. Indeed, unlike a policy holder, the defendant, as an officer and director of many of these law enforcement groups, had a fiduciary obligation to deal openly and honestly with them.

Moreover, the charge given by Judge Judd made it plain in at least three places that the United States had to prove beyond a reasonable doubt that "the defendant believed that the National District Attorneys Association or the other agencies might not have allowed the claim for reimbursement if it had known that the second claim for reimbursement for the same expenses were being presented to the County at the time" (A. 1854, 1864). Indeed, at the defendant's request, after the charge was completed, Judge Judd called the jury back and repeated it again, along with the following statement regarding the defendant's theory (A. 1890-1891):

> "And in connection with the question whether he believed that it wouldn't have been allowed, you should give consideration to the claim that he did not think he had been paid by Nassau County, he thought he had just gotten an advance which he was repaying—making the payments to Sam Houston."

Contrary to the defendant's claim this charge was clearly correct.[17]

B. The Sufficiency of the Evidence

The defendant's arguments on the sufficiency of the evidence is little more than a rehash of the arguments he made to the jury. He alleges that the proof mandates a finding that "he acted in good faith when he embarked upon his plan to pay [Sam] Houston" (Br. 40). Although he is confusing good motive with good faith, this argument depends in large part on the jury crediting Mr. Cahn's defense.

We have demonstrated earlier that there was ample basis for the jury to have rejected the Sam Houston defense in its entirety. The entire story falls almost entirely under the weight of its own inconsistencies, and there is ample reason to suspect that there was no bona-fide informer by the name of Sam Houston. Taken at its best, the jury would have had to agree with Mr. Cahn that he did not obtain reimbursement for his travel expenses from various law enforcement groups for expenses which

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[17] Moreover, the indictment is amply sufficient on its face. It not only tracks the language of the statute (18 U.S.C. § 1341), and specifically alleges that the defendant "devised and did intend to devise a scheme and artifice to defraud" (A. 33a), but sets forth in clear detail the essence of the scheme.

had been paid by Nassau County. Instead, the money he received from Nassau County for that purpose was a loan which Mr. Cahn repaid (by paying Sam Houston) with the money he received from the various law enforcement groups for his travel expenses. This claim is akin to an argument by one caught robbing a bank that he had an account at the bank and was simply making a withdrawal of money that the bank was obligated to pay him. It is absurd and the jury properly rejected it.[18]

POINT IV

THE ADMISSION OF TESTIMONY CONCERNING PRIOR SIMILAR ACTS WAS PROPER AND THEIR EXCLUSION WOULD HAVE BEEN AN ABUSE OF DISCRETION.

The central issue in this case, as the defendant has defined it, was his state of mind. The similar acts, which are discussed in full at pp. 19-22, involved instances in which the defendant billed Nassau County for expenses for travel and accommodations which were provided to him free of charge by hotels or travel agents. Although Judge Dooling, who presided over the first trial, held that these were not similar to the other double billings (S.A. 18-19), that ruling is clearly erroneous. It is hardly a difference of consequence that in one instance Mr. Cahn was seeking reimbursement for expenses which were paid by Nassau County, and in another, he is seeking reimbursement for expenses which—in fact—were being picked

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[18] It should also be recalled that the claims in Count Forty, which are the same as those involved in Counts One and Two, expressly certified that "funds are not available * * * from any other source" to pay the expense. This representation was plainly false and fraudulent even under Mr. Cahn's theory.

up by hotel or travel agent. Moreover, Judge Dooling was not aware of the fact—with respect to one of the three similar acts—that the defendant had attempted during the investigation to get the travel agent to lie about the incident—an act which was independently admissible to show guilty knowledge.

Of course, the indictment here was different than the one Judge Dooling had under consideration. Counts One to Three had involved the filing of false certifications to obtain reimbursements. The claims to Nassau County for complimentary rooms and travel likewise contained false certifications (S.A. 231, 237). Moreover, Count Forty-Six alleged, as part of the scheme to defraud, a claim for a complimentary room,[19] and although it was not alleged in Count Seventeen, the double billing there also included a separate claim for the complimentary room in the Americana Hotel in San Juan. Judge Judd indicated that this alone justified its admission (A. 309).

In any event, regardless of what Judge Dooling held, the decision under review is that of Judge Judd. His decision was clearly right and "[t]he weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has

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[19] The appellant has suggested that he was entitled to compensation from the National District Attorneys Association on a per diem basis and regardless of whether the hotel room was complimentary. Of course, this is hardly clear. The defendant relies on a conversation he had with a National District Attorneys Association official (A. 168) long after the event in preparation of trial. But the testimony leaves something to be desired. Although on cross-examination, the National District Attorneys Association official said that "Per diem covers room and board" (A. 206), the claim filed by Mr. Chan (Ex. 46A; S.A. 227), had hotels, meals, and incidentials separately listed. This hardly indicated that the specific claim here was for a per diem allowance.

a feel for the effect of the introduction of this type of evidence that an appellant court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F.2d 1076, 1092 (C.A. 2, 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1737 (1976).[20]

The defendant also alleges that the district court erred in the manner in which it called the attention of the jury to the fact that he was an interested witness and that he may "perhaps" have more of a motive to lie than other witnesses (1973). The defendant claims that this charge, "coupled" with the admission of the prior similar acts, was error (Br. p. 48). This charge, however, was proper, and no objection was taken to it.

POINT V

THE CASE SHOULD NOT BE REMANDED FOR RESENTENCE.

In imposing sentence, Judge Judd made the following statement (A. 1974-1976):

> "You have been convicted of 45 counts of filing false statements or mail fraud, all in connection with travel expenses which were reimbursed to you by the County of Nassau and also reimbursed to you by the National District Attorney's Association or various other non-profit organizations.
>
> Misrepresentations on travel vouchers are so common that they are colloquially referred to as 'swindle sheets.' In fact, I think both parties excused any prospective juror who had extensive experience in travel for his employer or any other organization. The frequency of misstatements

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[20] Needless to say, Judge Judd gave adequate limiting instructions (A. 401, A. 526, A. 1868).

concerning travel does not, however, excuse fraud in connection with the travel vouchers. Especially in case of a public official it is necessary to impose high standards of honesty.

Your explanation that the monies which you received from double billings were used to pay an informant who dealt with you personally was presented to the Grand Jury under instructions which said that this was an important factor but not a decisive factor. I must proceed on the basis that the jury verdict is an official finding of fact unless it may be reversed for any error of mine in the conduct of the trial or the instructions to the jury.

You have already suffered greatly, not only in anguish and expense, but also in the loss of your high position and the jeopardy to your professional career as a lawyer. The testimony of over 20 character witnesses and over 75 persons who have written to me attest that your reputation for truthfulness is good, and that your conduct with respect to the travel vouchers was an aberration in an otherwise honorable life, and one which I am confident will not be repeated.

Nevertheless, I believe that the effective enforcement of our criminal law requires that people know that serious violations carry something more than the mere opprobrium and anguish of a conviction. One purpose of imprisonment is to deter other people who may be tempted, even though it may not be necessary for rehabilitation of a particular offender.

Public respect for the law also requires that persons in high office and prominence not be treated more favorably than the lowly who may be guilty of similar offenses.

> Another fact that I must consider here is that a sentence after trial is somewhat tentative because there is always a possibility of reversal and a new trial before another judge. Any sentence that I impose puts a ceiling on what any other judge can do if there is a third trial and another conviction, which [sic] different evidence."

These were the thoughtful comments of an able district judge. While the final consideration to which the defendant now objects may not have been appropriate (*United States* v. *Fiore*, 467 F.2d 86, 90 (C.A. 2, 1972), *certiorari denied*, 410 U.S. 984 (1973), the defendant did not object at a time when it could easily have been corrected and during which the defendant made an extensive and heated attack on Judge Judd and voiced objection to factors which he did not think or believe should be considered (A. 1971-1972). The statement of Judge Judd was not plain error (Cf. *United States* v. *Fiore*, *supra*), particularly because the defendant may still move for a reduction of sentence.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 2, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney.
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 5th day of NOVEMBER, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~xx~~ two copies of the BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John M. Armentano, Esq.
Farrell, Fritz, Caemmerer & Cleary, P.C.
374 Hillside Avenue
Williston Park, New York 11596

Sworn to before me this
5th day of November, 1976

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON